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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1008

CLIFFORD J. LOCKE,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of the State of California, First Appellate District, Division One

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
Introductory Paragraph	1
Opinions Below	2
Jurisdiction	3
Constitutional and Statutory Provisions Involved	7
Questions Presented	7
Statement of the Case	10
How the Federal Questions Were Raised and Their Disposition	16
The Constitutional Question	16
The Other Federal Questions	20
Other Questions	24
The Federal Questions Are Substantial	25
The Constitutional Question	25
Conclusion	42

APPENDIX

	Page
The Constitutional and Statutory Provisions Involved Appendix "A"	1
Copy of Appellant's Affidavit Submitted Below Appendix "B"	10
Examples of the News Media Publicity of this Case Appendix "C"	14
Opinion of the Court of Appeals Appendix "D"	33

CASES

Page

Brady v. Maryland (1963) 373 US 83 ---------- 9, 22, 37

Dartmouth College v. Woodward, 4 Wheat (US) 518 ---------- 16, 27

Davis v. Virginia R. Co. (1959) 361 US 354 ---------- 39

Dennis v. United States (1950) 341 US 494 ---------- 28

Edwards v. California (1941) 314 US 160 ---------- 6

Estes v. Texas (1964) 381 US 532 ---------- 9, 21, 34, 35, 36

Flournoy v. Wiener La (1944) 321 US 253---------- 6

Johnson v. Zerbst, 304 US 458 -------- 38

Lambert v. California (1956) 352 US 914, decided 355 US 225----6, 17, 28

People v. McCalla (1923) 63 Cal App 2d, 783 ---------- 16

Meyer v. Nebraska (1923) 262 US 390---------- 16

Mishkin v. New York (1966) 383 US 502 ---------- 6

Morissette v. United States (1952) 342 US 246 ----------17, 28

Powell v. Texas (1967) 389 US 810, decided 392 US 514 ---------- 6, 29

Prudential Ins. Co. v. Creek (1922) 259 US 530 ---------- 6

People v. Richardson (1968) 258 Cal App 2d 23 ---------- 21, 35

Robinson v. California (1961) 368 US 918, decided 370 US 660---- 6, 28

Sheppard v. Maxwell (1966) 384 US 888 ---------- 35

Shuttlesworth v. Birmingham (1965) 382 US 87 ---------- 10, 24, 42

Smith v. California (1959) 361 US 147, decided 383 US 926 6, 17, 28

Thompson v. Louisville (1960) 362 US 199

United Brotherhood, C & J v. United States (1946) 330 US 395 40

United States v. Morgan, 346 US 502 38

CONSTITUTIONAL AND STATUTORY PROVISION

California Corporate Securities Law §26104 (a)-(f)--2, 3, 7, 9, 12, 13, 14, 25, 33, Appendix "A"

California Penal Code §484 -Appendix A, 7

United States Constitution Amendment V 7, 8, Appendix "A"

Page

Amendment VI------- 7, 10, Appendix "A"

Amendment VIII--7, 8, 34, Appendix "A"

Amendment IX --------- 7, Appendix "A"

Amendment XIV
5, 8, 10, 26, Appendix "A"

28 USC §1257 6

28 USC §2103 6

OTHER AUTHORITIES

Magna Carta, Section 20 ---------- 26

Raschkowskaja "On the Question of the Degrees of Guilt," Sovetskoe Gosvdarstve 58 (Russia Jan. 1955)---------- 30

5 R.I.D. 70 (Germany 1956)---------- 30

Tschikwadse "On Some Questions of Soviet Penal Law," 59 (Russia Sept. 1954) ---------- 30

3 R.I.D. 643 (Germany 1954)---------- 30

Ssergejewa, "On the Question of Individualization of Penal Responsibility," Sovetokoe Gosvdarstve, 33 (Russia Jan. 1951).----- 30

5 Jimenez De Asua, Tratado De Derecho Penal ---------- 31

Blau "Enige Bemerkungen zu dem Lehrbuch des Strafrechts von Jimenex de Asua, 66 Zeitschrift

Page

Fur Die Gesamte Strafrecht-
swissenschaft 297 (Germany
1954)---------- 31

JURISDICTION ON APPEAL

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October Term, 1969

No.___

CLIFFORD J. LOCKE,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of the State of California, First Appellate District, Division One

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Court of Appeal for the State of California, First Appellate District - Division One, entered on August 11, 1969.

A timely petition for a rehearing was denied on August 28, 1969, and the Supreme Court for the State of California denied a timely petition for a hearing on October 1, 1969. Said judgment affirmed appellant's conviction and sentence on various charges and upheld the validity of the California Corporate Securities Law against a federal constitutional challenge. The appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Court of Appeal (R)[1] is not reported. It is printed as Appendix "D", to this statement.

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[1]The reference "R" refers to the record on appeal, copies of which are lodged with the Clerk of this Court.

JURISDICTION

By two separate indictments appellant, Clifford J. Locke, was accused of: (1) a violation of the California Corporate Securities Law, Section 26104 (a) in that he sold a security interest in "Check-Stop" to one Sharon Brown on or about June 19, 1962 (TR 13)[2] and (2) violation of Corporations Securities Law Section 26104 (a) and (f) in that he sold an interest to James Barnett on December 24, 1962, to Thomas Beyrle on October 28, 1963, to Billy Rhea and Kumao "Skip" Yomashita on December 10, 1963 (Counts one through four TR 14-16); made false statements in an application for a permit to issue shares of Check-Stop, Inc., in violation of Corporations Code Section 26104 (a) (Count five TR 16), and committed grand theft (by fraud)(Section

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[2]The reference "TR" refers to the transcript on appeal.

484 of the Penal Code) in taking the money of Thomas Beyrle, Kumao "Skip" Yomashita, and in a separate matter of Steven Van Tuyl (Counts six through nine, TR 17, 18). The two indictments were consolidated (Clerk's TR 11). The jurisdiction of the trial court was founded on Penal Code §777. A jury trial began on May 23, 1966 (TR 12) and concluded three weeks later on June 10, 1966 (TR 980).

After deliberating about twelve hours, the jury found appellant not guilty as to the count involving Sharon Brown and the count involving grand theft from Kumao "Skip" Yomashita (TR 983, 984). He was found guilty of all the other counts (TR 908-983).

Appellant moved for a new trial (C1 TR 58)[3] which was denied (C1 TR 60). Imposition of sentence was suspended for

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[3]The reference "C1 TR" refers to the Clerk's transcript copies of which are lodged with the Clerk of this Court.

five years and appellant was granted probation subject to his spending six months in the county jail (TR 992, 992). This was to run concurrently (TR 994).

Appellant filed a timely notice of appeal under Penal Code §1237 on July 29, 1966, pursuant to Rule 3 (a) Rules of Appeal (C1 TR 63). Among the many issues presented was the validity of the California Corporate Security Law as applied to appellant within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution (R 4, p. 26).

The appeal was heard on April 30, 1969. On August 11, 1969, the Court of Appeals rendered its opinion affirming the conviction on all counts and rejecting the Constitutional challenge (Op 29, 74). A timely petition for rehearing was denied on August 28, 1969 (R 5) and the California Supreme Court denied a timely

petition for a hearing on October 1, 1969 (R 6).

The Notice of Appeal to the Supreme Court of the United States was filed on October 8, 1969 (R 7), and a stay of the remittitur was granted on October 8, 1969.

The jurisdiction of the Supreme Court to review this case is conferred by Title 28 United States Code Section 1257 (2) and 2103. The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Flounoy v. Wiener La (1944) 321 US 253, 263
Prudential Ins. Co. v. Cheek (1922) 259 US 530, 547
Mishkin v. New York (1966) 383 US 502, 512-13
Lambert v. California (1956) 352 US 914, decided, 355 US 225
Smith v. California (1959) 383 US 926, decided 361 US 147
Edwards v. California (1941) 314 US 160, 171
Robinson v. California (1961) 368 US 918, decided 370 US 660
Powell v. Texas (1967) 389 US 810 decided 392 US 514

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Constitution of the United States are:

Amendment V and VI, which is included in Appendix A, infra
Amendment VIII which is included in Appendix A, infra
Amendment IX which is included in Appendix A, infra

The validity of a statute is involved. It is California Corporate Securities Law §26104 (a) - (f) (West's California Code Annotated), which is set out in Appendix A infra.

Another relevant statutory provision is Penal Code §484 which is set forth in Appendix A, infra.

QUESTIONS PRESENTED

1. The Constitutional Question - Is the Corporate Securities Law of the State of California (Corp. Code, former Section 25000 et seq., particularly

Section 26104, subds (a) (b) and (f) as in effect prior to January 2, 1969, and preserved by Section 25704, subds (a) as added by the Corporate Securities Law of 1968) constitutional?

(a) It is proper or even constitutional within the meaning of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution to punish as a felony an act unaccompanied by mens rea?

(b) Since the statute dispenses with the requirement of mens rea and the term securities is not defined, is not the statute void for vagueness within the meaning of the due process in that it does not provide an adequate warning?

(c) Does not the statute, therefore, represent a cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution?

2. Additional Federal Questions -

Does the probability that the prosecution albeit inadvertently, suppressed exculpatory evidence require a court to remand the appeal for a hearing on this issue and should the court on remand find such to be the case grant a new trial under Brady v. Maryland, (1963) 373 US 83.

3. In order to prove prejudice due to undue publicity within the meaning of Estes v. Texas (1944) 381 US 532, it is necessary for the defendant to request a change of venue, continuance, prove on voir dire obvious prejudice particularly in view of the voluminous and dramatic pre-trial and trial media publicity that occurred in this case.

4. Since the California Corporate Securities Law dispenses with the requirement of mens rea and does not define the term "security" was not the trial court's instructions that the various transactions in issue were securities as a matter of

law tantamount to directing a verdict of guilty in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and an abridgment of the appellant's right to trial by jury within the meaning of the Sixth Amendment of the Constitution?

5. In light of Shuttesworth v. Birmingham (1965) 382 US 87, is it not necessary for a conviction to comply with due process of law that each element of the crime charged (in this case fraud) supported by the evidence?

STATEMENT OF THE CASE

Appellant is a former famous sergeant of the San Pablo Police Department (TR 121) who left the department in 1960 and started a private detective agency in El Cerrito, California (TR 608). In 1962 he conceived and began another business, which was designed to sell the

names of bad check passers to subscribing merchants. Appellant compiled an extensive list of persons who had passed bad checks, installed an elaborate telephone system, and sold the information to area retailers for an agreed fee per month. When the subscribing merchant was in doubt as to whether to cash a check, he would telephone appellant's business known as "Check-Stop", and through the use of a Remington Rand Cardveyor (TR 610), in approximately one minute, could determine whether the person presenting the questioned check had a history of passing bad checks.

In April 1963, Check-Stop was incorporated. The Division of Corporations issued a restricted permit allowing the issue of stock to six individuals and said permit expired by its own terms on October 10, 1963. The stock issued under this permit was required to be held in

escrow.

The jury found that on December 24, 1962, appellant sold a security interest to James Larry Barnett in violation of Corporation Code Section 26104 (a) and (f). Mr. Barnett originally met appellant when Mr. Barnett was employed by the telephone company. In this capacity Mr. Barnett arranged the telephone system for Check-Stop, then subsequently became employed by appellant as sales manager. The employment agreement was made approximately one month prior to the transaction of December 24, 1962.

The next alleged violation of the Corporations Code Section 26104 (a) and (f) occurred on October 28, 1963, when, the jury found, appellant had sold a security interest to Thomas A. Beyrle in violation of said statute, and also found appellant guilty of grand theft by false pretenses as a result of this

transaction.

Mr. Beyrle was looking for an investment and was referred by a local banker in 1963. The parties came to an agreement whereby Mr. Beyrle loaned $7,200 to appellant, and in return was to receive an interest in Check-Stop, and also an interest in appellant's other business, the Locke Detective Agency.

The third and fourth alleged violations of Corporations Code Section 26104 (a) and (f) occurred on December 10, 1963. Appellant was convicted of selling security interests to Billy L. Rhea and Kumao Yamashita. Both Mr. Rhea and Yomashita were automobile salesmen for the East Bay Chevrolet Company. Mr. Rhea was acquainted with appellant prior to the transaction in question, and he introduced Mr. Yomashita to appellant. Mr. Rhea then loaned appellant first $800 and then an additional $925; Mr.

Yomashita loaned appellant $4,500. Appellant gave each of them a document in which he agreed to apply to the Corporations Commissioner for permission to sell or issue stock to both parties. Appellant also gave Mr. Yomashita a note for $6,500, which was to cover both the loans made by Mr. Rhea and Mr. Yomashita.

The trial court first instructed the jury that criminal intent is not an element under the Corporate Securities Law (TR 953). Then it instructed the jury that all the transactions charged were security interests as a matter of law (TR 952, 953, 960, 967, 973-979), thus taking from the jury the sole issue involved with respect to violations charged under the statute.

Throughout the trial defendant contended he had no intent to solicit securities and that he thought he was entering into a partnership, joint venture,

or at least a pre-incorporation agreement but had no inkling that he was soliciting securities.

The final alleged violations of the Corporate Securities Law involves Section 26104 (b) of the Corporations Code. The jury found that appellant failed to report certain liabilities of Check-Stop existing when the financial statement, submitted as an exhibit to the application for a permit to issue stock was filed on April 9, 1963.

The violation appealed herein involves a fact situation entirely unrelated from those already mentioned. The jury found appellant guilty of grand theft by false pretenses as set forth in Section 484 of the Penal Code. The transaction took place on January 15, 1965 and involved two caterpillar tractors. On the above date appellant sold them to Mr. Steven E. Van Tuyl for $5,000. The tractors were

allegedly represented as being unencumbered.

HOW THE FEDERAL QUESTIONS WERE RAISED AND THEIR DISPOSITIONS

The Constitutional Question

In the appeal of this case to the Court of Appeals there were two sets of briefs, one by the public defender and one by substituted counsel.

In the first set, it was contended that since the Corporate Securities Law dispenses with mens rea, People v. McCalla (1923) 63 Cal App2d 783, it is the type of law that condemns before it hears which Chief Justice Marshall complained about in Dartmouth College v. Woodward, 4 Wheat (US) 518, and is similar to the statute struck down in Meyer v. Nebraska (1923) 262 US 390, 67 L ed 1042, 43 S Ct 625.

In the reply submitted by appellant's substituted counsel, the point was further elaborated.

It was suggested that this statute is clearly unconstitutional within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution, since it punishes as a felony an act unaccompanied by mens rea. It was suggested that the United States Supreme Court has reluctantly, but never unhesitantly upheld dispensing with mens rea for only minor misdemeanors, so-called malum prohibitum crimes. It has never done so for felonies and indeed in Morissette v. United States (1952) 342 US 246, 96 L ed 288, 72 S Ct 240 the court expressed concern for such a law. It was further submitted that the statute does not provide an adequate warning within the meaning of Lambert v. California (1957) 355 US 225, 2 L ed 2d 228, 78 S Ct 240, Smith v. California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215.

The Court of Appeals sustained the

act (Op 20-20). The Court conceded that the statute does not require criminal intent, but stated that the statute has been upheld against a series of attacks (Op 28); never, appellant reasserts, however, on the grounds mentioned herein. The Court said:

> "Defendant seeks to set aside his conviction on the five counts which charge violations of the Corporate Securities Law because section 20104 of the Corporations Code under which he was indicted and convicted is unconstitutional. This contention is predicated upon the theory that it is a violation of the Fifth, Ninth and Fourteenth Amendments of the United States Constitution to punish as a felony an act which is not accompanied by the mens rea or scienter which was required by the common law."

> "In People v. Hernandez, supra, the court cited People v. McCalla as an example of an instance where 'culpability has been completely eliminated as a necessary element of criminal conduct in spite of the admonition of section 20 to the contrary.' (61 Cal.2d at p. 532.) The court, however, did not overrule McCalla, but recognized that there were, and distinguished, situations where the governing statute by implication or otherwise expresses

> a legislative intent or policy to be served by imposing strict liability. (Id., p. 533. See also, People v. Superior Court (1969) 70 A.C. 129, 138-139; and People v. Wells (1968) 261 Cal. App.2d 468, 478-479.) The Corporate Securities Law is such a statute, and, in other aspects, it has generally been upheld against attacks of unconstitutionality."
>
> "In People v. Sears, supra, the court observed, 'The language of the Corporate Securities Law provides an adequate warning as to what conduct comes within its prohibition. [Citations.] The language conveys a sufficient definite warning from which any person engaging in the business of issuing or selling securities may ascertain whether his business or enterprise has a sanction of law.'"

The court also said that legislature has the power to impose strict liability (Op 27-28). The appellant concedes this has been approved, but only for minor misdemeanors, not for felonies. Significantly, the court did not consider the fact that the penalty imposed under this statute is a felony, i.e. maximum five years in the penitentiary. The court also said the statute provides an adequate

warning (Op 28), assuming this is determinative.

In the petition for a rehearing, and in the petition for a hearing to the State Supreme Court, appellant demonstrated that since the term "security" is not defined it is impossible for the act to provide an adequate warning. The court felt that it was unnecessary to certify to the existence of a federal question since the record clearly indicates the existence of one.

THE OTHER FEDERAL QUESTIONS

Undue Publicity

Due to appellant's great notoriety there was considerable pre-trial and trial newspaper and media coverage. Most of the articles were really releases from the police department. They all contained references to the fact that appellant was being investigated for many other

matters. Some were quite dramatic. There were references to witnesses crying on the stand and a widow telling of losing their life savings. The publicity was virtually statewide. See Appendix "C" for some of them, infra.

In the appeal, appellant suggested that this case was onall fours with Estes v. Texas (1964) 381 US 532, 538, in view of the similarities between the factual patterns of the two cases. However, the Court of Appeals rejected this saying that the accused failed to prove obvious prejudice (Op 25) and citing state decisions, People v. Richardson (1968) 258 Cal App.2d 23 as controlling the disposal of the federal question. However, Estes flatly rejected this requirement since the probability of prejudice is inherent by the voluminous and dramatic publicity as occurred herein.

SUPPRESSION OF EXCULPATORY EVIDENCE

As indicated in Appendix "B", it is evident that the State inadvertently suppressed exculpatory evidence. These facts became known to appellant after the appeal was argued. So in his petition for rehearing, he requested that at least the case be remanded for a hearing on this issue, by authority of Brady v.Maryland (1963) 373 US 83. It was suggested that Brady clearly demonstrated that this issue can be raised at any time even after the appeal was concluded. In Brady it was presented on post conviction relief long after the time for appeal had elapsed.

INSTRUCTING A VERDICT OF GUILTY

At the trial, further, the court instructed as a matter of law that each of the transactions charged were security interests (TR 979-952). Appellant suggests at the trial (TR 979-973) and throughout the appeals (Reply 1-2, 10, 22) that this

fraud beyond a reasonable doubt. It was suggested that all the elements of legal fraud were not proved by even the preponderance of the evidence. It was suggested that the totally devoid of evidentiary support rule of Thompson v. Louisville (1960) 362 US 199, has been largely abandoned by Shuttlesworth v. Birmingham (1965) 382 US 87, and similar cases. Now, each element of the crime must be supported by the evidence in order to comply with due process of law. The Court of Appeals rejected this saying there was sufficient evidence to support the finding of fraud.

OTHER QUESTIONS

Many other questions were submitted to the Court of Appeals, many falling within the general principles of due process of law such as the prejudicial instructions concerning the fraud charges

and the general problems that arise by trying a crime requiring mens rea with one that does not. However, although they were answered by the Court of Appeals primarily on state law, they may provide important issues that should be resolved by this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Constitutional Question - Dispensing With Mens Rea For Felonies

The question presented herein is one of first impression, having never been considered by this court, although the court has indicated on occasion in dicta grave concern about dispensing with mens rea for felonies. Appellant submits that the California Corporate Securities Law is typical of the securities laws throughout the country, and is indicative of the growing spate of statutes that impose harsh criminal sanctions upon the blame-

less; or those who do not possess mens rea in order to relieve the prosecution of proving an often difficult element.

1. Appellant respectfully submits that it is a violation of due process of law within the meaning of the Fourteenth Amendment of the United States Constitution to punish as a felony an act unaccompanied by mens rea. Indeed, such runs counter to the very foundations upon which this and all countries based upon Anglo-American principles are based. This principle can be found in the Magna Carta:

> "A free man shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it, saving to him his contentment; and after the same manner a merchant, saving to him his merchandise. And a villein shall be amerced after the same manner, saving to him his wainage, if he shall fall under our mercy; and none of the aforesaid amerciaments shall be assessed but by the oath of honest men in the neighborhood." Section 20

In Dartmouth College v. Woodward, supra, Chief Justice Marshall said this results in a law that condemns before it hears in violation of due process.

Appellant suggests, therefore, that the time has come to put a stop to attempts to dispose with mens rea for felonies. This Court has reluctantly upheld dispensing with criminal intent for minor misdemeanors or so-called malum probitum crimes. However, the court has never unanimously and unequivocally upheld such, even for misdemeanors. In every case, without exception, wherein the court has upheld such, there has always been a proviso indicating less than complete approval.

This Court, however, has never endorsed dispensing with mens rea for felonies, indeed this issue has never been tendered for resolution; however, it has expressed grave concern for such

a law. In Morissette v. United States supra, Mr. Justice Jackson speaking for the court quoted from Justice Cardoza in indicating some clear limits on imposing criminal liability without fault.

This Court has had a continuing struggle over the concept of mens rea. It has repeatedly reiterated the basic principle:

> "... the existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

Dennis v. United States (1950) 341 US 494, 500, see also Lambert v. California (1957) 355 US 225, Smith v. California (1959) 361 US 147, and indeed Robinson v. California (1962) 370 US 660. In all these cases, this court has indicated that criminal responsibility does have constitutional dimensions.

Only last term Mr. Justice White indicated in his concurring opinion

in Powell v. Texas (1968) 392 US 514, 549-554, that he was prepared to accept a requirement of mens rea for all criminal prosecutions.

Appellant, submits that at the very least, mens rea should be required for all felonies in order for American criminal jurisprodence to maintain its enlightened position throughout the world. Yet the trend throughout the country is the reverse as the California Corporate Securities Law demonstrates.

Felonies have been reserved for those crimes considered malum-in-se those inherently evil. The purpose of a lengthy prison term is to deter and rehabilitate evil minds, it is said. If someone does not have an evil mind, how can he be deterred or rehabilitated by a lengthy sentence. To punish just an actus reas can serve no purpose other than retribution. Logically, by dis-

pensing with criminal intent neither accident nor insanity is a defense under this type of a statute.

In the field of criminal law, no question occupies today's scholars, reformers and legislators as much as that of the mental element of crime, mens rea. The interest is world wide. Even in the Soviet Union, an astonishing ration of printer's ink and paper has been apportioned for scholarly excursus on the topic.

Raschkowskaja "On the Question of the Degrees of Guilt," Sovetskoe Gosvdarstve 58 (Russia Jan. 1955); 5 R.I.D. 70 (Germany 1956); Tschikwadse "On Some Questions of Soviet Penal Law," 59 (Russia Sept. 1954); 3 R.I.D. 643 (Germany 1954); and particularly Ssergejewa, "On the Question of Individualization of Penal Responsibility," Sovetokoe Gosvdarstve, 33 (Russia Jan. 1951).

All over the world mens rea has

been made a principal ingredient for all major crimes, i.e. felonies. See 5 Jimenez De Asua, Tratado De Derecho Penal. Blau "Enige Bemerkungen zu dem Lehrbuch des Strafrechts von Jimenex de Asua, 66 Zeitschrift Fur Die Gesamte Strafrechtswissenschaft 297 (Germany 1954). There is no textbook on criminal law which does not begin with, or early make the assertion that every crime is composed of an act and intent.

In this case, appellant entered into a series of transactions, which the court instructed the jury as a matter of law that they were all security interests. The defendant maintained throughout the trial that he honestly felt that he was entering into partnerships, joint ventures, or preincorporation agreements and had no idea, much less intent, to solicit securities, yet the trial court disagreed and so instructed the jury.

Further, appellant maintained throughout that he did not intend to bilk anyone and indeed every alleged victim has been paid back. The state conceded that it was possible that defendant may have honestly felt he was not soliciting securities, and had no intent but this was irrelevant under the statute since accident, or the like is not a defense.

The State was correct legally under state law because it is only necessary that the defendant be conscious of his acts and a conviction is required. For this a defendant faces five years. The appellant will be in legal custody for five years after serving a six month prison term, despite as the State conceded, he had no evil intent whatsoever. Appellant submits that in no other country based on Anglo-American principles can something like this occur.

2. The Court of Appeals answered

the above argument, in part, by saying the Corporate Securities Law provides an adequate warning (Op 28). Appellant suggested, however, that it is impossible for the statute to provide an adequate warning, as noted throughout the trial of this case and the appeals, the term "securities" is not defined by the statute. Instead, the California courts have preferred to construe the term on a case by case method. The lower court's opinion (Op 34-53) clearly demonstrates some of the multitudinous occasions the courts have had to construe the term. If the statute does not provide an agreed warning for the California courts or lawyer, how can it provide an adequate warning to the average layman.

A Californian had better not attempt to form and finance a business of any kind because if a court later construes his acts as the solicitation of security

interests he must be punished since mens rea is not an element. No amount of judicial interpretation can save this statute. The California statute is a typical in not defining the term which only exacerbates dispensing with mens rea.

Thus, the sanctions under the statute are also a cruel and unusual punishment within the meaning of the Eighth Amendment. A host of problems arise from dispensing with mens rea. The purpose of doing os is that it relieves the community of the burden of proving a difficult element. Appellant suggests however, this is not too great a burden when a man faces five years in prison.

THE PROPER INTERPRETATION OF ESTES v. TEXAS (1964) 381 US 532 .

The appellant suggests that the Court of Appeals determined the issue of undue

publicity in a way probably not in accord with applicable decisions of this court. The court cited People v. Richardson (1968) 258 Cal App 2d 23, 27-29 as controlling the federal question, in holding that the appellant must be able to prove obvious prejudice. However, People v. Richardson is impliedly vacated by Estes v. Texas (1964) 381 US 532, and to a lesser degree by Sheppard v. Maxwell (1966) 384 US 888.

Both cases held that the defendant need not prove actual prejudice where the probability of prejudice was great. It is probably necessary for this Court to make explicit certain aspects of its holding in Estes.

In this case, the publicity was extensive, virtually state-wide, and quite dramatic as the appendix to the brief, to the court of appeals demonstrated. Appellant did not request a change of venue; however, Mr. Estes made only one

request but the publicity continued unabated; he did not make a second request. Further, there was no record of Mr. Estes requesting a continuance nor asking the jurors on voir dire about the publicity nor exhausting his peremptory challenges. Yet the court below here felt these were a prerequisite; this was not the ruling in Estes. Further, the jury was sequestered during Estes' trial, they were not in this case. Included in the appendix are only some examples which were submitted to the lower court of the type of notoriety that took place before and during the trial. Appellant urges that the volume was overwhelming and most of it were releases from the police department.

Appellant respectfully suggests that this Court should not countenance the type of free for all that took place during the trial and should not permit the gradual erosion of the apparently

rather clear principles promulgated in Estes.

THE PROPER INTERPRETATION OF BRADY v. MARYLAND

Appellant submits that this court can expect many cases involving further amplification of the principles crystalized in Brady v. Maryland (1963) 373 US 83. In that case, this court held that the suppression of exculpatory evidence, upon request at anytime by the prosecution is a denial of due process irrespective of the good or bad faith of the prosecution. Thus, and the case made clear that this issue may be raised at anytime even on collateral attack. Brady raised the issue on post conviction relief long after the time for appeal had elapsed. This is based on the principle that a conviction that violates due process is a nullity, indeed a jurisdictional bar that

makes it vulnerable to collateral attack, cf. Johnson v. Zerbst, 304 US 458, and United States v. Morgan, 346 US 502. The facts as applied to appellant become known long after the appeal had been argued. Thus, appellant raised the issue in his petition for a rehearing and petition for a hearing to the California Supreme Court. A copy of the affidavit can be found in Appendix "B" to this statement. It is apparent and the appellant feels he can so prove on remand that the account book suppressed contained very exculpatory evidence in this most complex case pertaining to the alleged false statements to the Commissioner and the fraud charges. Accordingly, he requested in his rehearing the court remand this case for a hearing by authority of Brady and should he be able to prove the allegations the conviction set aside.

Appellant respectfully submits that it may be in order for this Court to remand this case without prejudice regarding the other issues with directions that the trial court afford him a hearing on this issue. Plenary consideration, however, may be desirable so this court can consider the ramifications of Brady in depth.

INSTRUCTIONS AS TANTAMOUNT TO DIRECTING A VERDICT OF GUILTY AND ABRIDGING APPELLANT"S RIGHT TO JURY

The trial court instructed the jury that the various transactions charged in the indictments were security interests as a matter of law. This was tantamount to directing a verdict of guilty since criminal intent is not an element.

To withdraw crucial questions from the jury is to usurp its function, Davis v. Virginia R. Co. (1959) 361 US 354. No

matter how conclusive the evidence may be, the trial court may not direct a verdict of guilty, United Brotherhood, C & J v. United States (1946) 330 US 395, 91 L ed 973. Any other rule makes the right to trial by jury under the Sixth Amendment nugatory. Only a man's peers has the power to convict, not the court. The court below agreed that this is the general rule but held it is inapplicable to this case where the court alleged, there was uncontroverted evidence. This appellant strenuously rejects. Further, there is really no such thing as uncontroverted evidence pointing to guilt in a criminal case. The burden is entirely upon the prosecution; the defendant need do nothing. Even if the defense offers no evidence which is demonstrably not the case here, the state's evidence does not necessarily stand as uncontroverted until the jury determines it so, which includes

determining the witness' credibility and the like. What the court thinks is not controlling; it is what the jury thinks.

The length of the trial (three weeks) however, is a clear indication that the state's evidence was certainly controverted. The problems involved here demonstrates once again the difficulties inherent in dispensing with mens rea. This makes the issue pertaining the securities the most crucial issue of the case. Thus, the court's instructions were tantamount to directing a verdict of guilty. This is a clear violation of a defendant's basic rights to a fair trial and is a grave miscarriage of justice.

OTHER FEDERAL QUESTIONS

Although the Constitutional question is sufficient to give this court jurisdiction by appeal and the others give this court jurisdiction by appeal when

added to the first and by certiorari standing alone; and they are substantial, many other questions were presented which this court may determine warrant plenary consideration.

Among these is whether the totally devoid of evidentiary support rule has been broadened to require evidentiary support of each element of the crime charged. Shuttlesworth v. Birmingham (1965) 382 US 87. In this case, appellant submits the charge of theft by fraud, specifically intent to deceive and reliance are totally lacking in evidentiary support as indeed is the falsity of the representation.

In addition, are certain problems raised by trying together a crime involving criminal intent and one that does not. Among the difficulties is that the prosecution is permitted to get into evidence certain types of evidence that

it could not otherwise do had the crimes been tried separately.

CONCLUSION

Since this court has never ruled on the issues presented in the constitutional question and the California Corporate Securities Law is typical of the so called blue sky laws throughout the country and is in keeping with the trend, appellant respectfully submits that this is a substantial question a resolution of which could have profound ramifications. It is difficult to understand why in 1969 this question is still one of first impression. The other federal questions demonstrate the need for further clarification of certain important principles already established by this court; many others need further amplification or are gradually being eroded by the lower courts so as to suggest the immediate attention

of the court may be necessary.

It is respectfully submitted, therefore, that probable jurisdiction should be noted and the case set for argument.

Respectfully submitted,

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